MEDICAL JURISPRUDENCE †

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Blood Grouping Tests as Evidence of Non-Parentage

In *Arais* vs. *Kalensnikoff*, 95 Cal. Dec. 4, the facts were as follows:

Plaintiff, who was separated from her husband, commenced action to secure a judicial determination that defendant was the father of her illegitimate child. Plaintiff claimed that she had not had sexual intercourse with anyone other than defendant for some time and that she had frequently had relations with him. The defendant denied that he had ever had intercourse with plaintiff at any time. The trial court, with plaintiffs's consent, ordered that a Landsteiner blood test be made. The court appointed a reputable physician who administered the test and concluded that the child could not possibly be the offspring of the defendant if the plaintiff were the child's mother.

The trial court, in spite of the findings resulting from the Landsteiner blood grouping test, held that the defendant was the father of plaintiff's child. The case was first appealed to the District Court of Appeal and that court reversed the trial court on the ground that the blood grouping test constituted conclusive and unanswerable evidence of non-parentage. A hearing was then granted by the Supreme court which, after further argument by counsel, reversed the District Court of Appeal and affirmed the judgment of the trial court. The Supreme Court specifically held that findings based upon the Landsteiner blood grouping test do not constitute conclusive evidence of non-parentage, but only rebuttable evidence, *i. e.*, evidence that may be offset by contradictory testimony and believed or not believed by the trial court or the jury.

The opinion of the Supreme Court stated that under Code of Civil Procedure, Sec. 1978, no evidence is by law made conclusive or unanswerable unless so declared by some express provision of the Code of Civil Procedure, and that there was no section in the Code of Civil Procedure making blood grouping tests conclusive evidence of non-parentage. The court further held that blood grouping tests had not as yet attained sufficient certainty to be brought within the doctrine of judicial notice. That is to say, the court was of the opinion that findings resulting from blood grouping tests could not be accepted by the courts as an uncontrovertible scientific truth. In this connection the court pointed out that blood grouping tests cannot be used affirmatively to prove that a certain person is the parent of a particular child.

In most European countries courts have held that if the results of a blood grouping test indicate that paternity is impossible, such results are conclusive and beyond dispute by the parties. (See Note, 26 Cal. Law Review 456). Some jurisdictions in the United States follow the European view, for example, New York and Pennsylvania. California is apparently the first jurisdiction to refuse to consider the results of a blood grouping test to be conclusive evidence of non-parentage and to allow the testimony of witnesses to be received in evidence in contradiction thereof. A commentator in the California Law Review remarks that:

> While the case is one of first impression, it is contrary to the general trend of decisions, both concerning the blood group test in particular and scientific evidence in general.

The use of the Landsteiner blood grouping test for the purpose of proving non-parentage focuses attention upon one of the most perplexing problems confronting judges; that is, when is it safe to accept a scientific theory as an uncontrovertible fact. The rules of law are clear enough, *viz.*, that the laws of nature, the measure of time, geographic divisions, political history of the world and certain additional scientific or physical facts which have been proven beyond any doubt, are not matters subject to conflicting testimony, but, the difficulty arises when a new scientific development is offered as an uncontrovertible fact and is claimed to be entiled to take its place within the foregoing list. Judges as a whole are inclined to be very slow to accept any new subject of knowledge as conclusive and this hesitation accounts for the difference of opinion amongst courts with respect to the conclusiveness of the Landsteiner blood grouping test.

Inasmuch as all competent scientific authorities apparently assent to the proposition that the Landsteiner blood grouping test is wholly reliable and can prove beyond question that particular persons are *not* the parents of a particular child, it is seemingly quite unfortunate that judicial conservatism has prevented the acceptance of the scientific point of view by the law. It is the general rule in California that a finding of fact based solely upon the testimony of witnesses which controverts physical facts or which is based upon scientifically impossible testimony will be set aside on appeal as not supported by substantial evidence. The foregoing rule would seem to be applicable to the case under discussion. Yet, on the other hand, it must be conceded that the ends of justice are better served in the long run by caution in the acceptance of new scientific facts as conclusive than by overenthusiastic acceptance of new theories which may contain hidden flaws at the time undiscovered.

† Editor's Note.—This department of CALIFORNIA AND WESTERN MEDICINE, presenting copy submitted by Hartley F. Peart, Esq., will contain excerpts from and syllabi of recent decisions and analyses of legal points and procedures of interest to the profession.

SPECIAL ARTICLES

PROPOSED CALIFORNIA HUMANE POUND ACT IS REALLY AIMED AT STOPPING MEDICAL RESEARCH

The Society of American Bacteriologists, meeting in San Francisco, passed a resolution admittedly aimed at the miscalled "Humane Pound Act," now on the California ballot [for decision on November 8, 1938], warning against misguided efforts, "by direct and indirect means," to cut off the supply of animals needed for scientific research and for the preparation of biological products. Such activities, the resolution declared, "should be opposed by all enlightened members of the community."

Similar action will, of course, be taken by other scientific bodies, and, as on former occasions, by the authorities of the principal universities. These are, obviously, not merely "enlightened members of the community," but are, on this subject, precisely its best informed members, since they are the only ones who have made it their life work, and know, first hand, in detail, what goes on in the laboratories which —instead of the pounds—are the real objectives of this measure.

On this subject, they might be liars, as the "antivivisection" crusaders charge, but they cannot be ignorant. And they say that the horror tales of the antivivisection literature are fictions or distortions.

These authorities, furthermore, are not inhumane persons, and are not regarded as untrustworthy in the other relations of life. If the real purpose of the "Humane Pound Act" were to make pounds humane, and if it would accomplish this, they would be for it. And if the "cruelties" charged against their laboratories actually existed, they would be the first to take steps against them.

If these scientific men, on a matter on which they have first-hand acquaintance with all the facts, are falsifying the truth for pay, to promote the nefarious profits of fraudulent serum vendors, that is a far worse evil than the "cruelties" they are alleged to perpetrate or condone. For these include the men to whom we intrust the university training of the youth who are to guide the oncoming generation. To corrupt the minds and characters of a whole generation by subjecting its selected best to the formative influence of men of this degree of dishonor would be a worse menace to "humane" progress than the slaughter of all the stray dogs, guinea pigs, white rats and fruit flies in America.

If the responsible heads of our universities were this sort of men, the sooner we closed their institutions the safer we would be.

Furthermore, these very bacteriologists who passed this resolution are the leaders of the profession to which we entrust the protection of the public health. We drink our